



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CAMPAIGN & POLITICAL FINANCE

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August 29, 1997
AO-97-15

Thomas R. Kiley, Esq.
Cosgrove, Eisenberg and Kiley, P.C.
One International Place, Suite 1820
Boston, MA 02110-2600

Re: Limited Liability Companies

Dear Mr. Kiley:

This letter is in response to your July 3, 1997 request for an advisory opinion regarding contributions from limited liability companies.

Questions:

- (1) May Massachusetts political committees accept contributions from limited liability companies (LLCs) organized under M.G.L. c. 156C?
- (2) Must contributions be attributable to members?
- (3) Are LLCs considered "membership organizations"?

Answers:

- (1) Yes. LLCs are not "business corporations" within the scope of the prohibition on contributions stated in section 8 of the campaign finance law. Funds contributed by LLCs, however, may not include amounts attributable to a member which is either a professional or business corporation.
- (2) Yes, contributions from LLCs, like contributions from partnerships, must be attributable to individual members.
- (3) Yes, if all members of the LLC are individuals rather than business entities.

Discussion:

The Massachusetts Limited Liability Company Act became effective on January 1, 1996. See M.G.L. c. 156C, s. 1, et seq and 950 CMR 112.00. Many Massachusetts entities which previously had been professional corporations or partnerships, particularly some law firms, have since become LLCs.

An LLC is a hybrid business organization which has some characteristics of a corporation, and other characteristics of a partnership. The LLC form of organization may be attractive to some because the debts of the entity do not become the debts of the members. At the same time, an LLC is structured to allow "pass through" partnership tax treatment. See Fletcher, Cyclopedia of Corporations, vol. 1A, s. 70.50 and Peairs, Mass. Practice, vol. 13, s. 214. Other features which distinguish LLCs from corporations include a definite lifespan, non-freely transferable memberships, and optional designation of a manager. See c. 156C, ss. 23, 39 and 43.

An LLC is defined in section 1 of c. 156C as "an unincorporated organization formed under [c. 156C] having two or more members." Members can be individuals, partnerships, LLCs, trusts, estates, as well as business and professional corporations. Id. LLCs can carry on "any lawful business, trade, profession, purpose or activity." M.G.L. c. 156C, s. 6. Although an LLC's debt is solely that of the LLC, profits and losses are attributed to the LLC's members according to the LLC's operating agreement. Each member has a "limited liability company interest" in the profits and losses of the LLC. M.G.L. c. 156C, ss. 2, 22 and 29. In addition, members maintain equity accounts which may be affected by the making of contributions or other financial activity.

1. Contributions from an LLC are not subject to the prohibition in M.G.L. c. 55, s. 8, barring contributions from business corporations.

The campaign finance law, M.G.L. c. 55, prohibits business and professional corporations from making contributions or expenditures to aid any candidate or political party. Specifically, section 8 of chapter 55 states:

No corporation carrying on the business of a bank, trust, surety indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, no business corporation incorporated under the laws of or doing

business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly [make contributions to aid or oppose a candidate or political party]¹. [M.G.L. c. 55, s. 8, emphasis added].

The statute does not by its terms prohibit contributions from LLCs and this office has not previously issued an opinion regarding the applicability of section 8 to LLCs.²

The statutory language of section 8 must be narrowly construed because violation of the section can be punished as a crime. See Weld for Governor v. Director of OCPF, 407 Mass. 761, 766 (1990). The statute contains a very specific list of the various types of business entities which are subject to the prohibition and LLCs are not on that list.³

Similarly, the U.S. Supreme Court, in construing section 8, has concluded that the list of entities covered by the statute should be read literally:

Nor is the fact that s. 8 is limited to banks and business corporations without relevance. Excluded from its provisions and criminal sanctions are entities or organized groups in which numbers of persons may hold an interest or membership, and which often have resources comparable to those of large corporations.

First National Bank of Boston v. Bellotti, 435 U.S. 765, 794 (1978). Even though LLCs may have many members and therefore may have resources comparable to large corporations, they are not subject to section 8.

2. Contributions from LLCs should be attributed to individual members.

Having concluded that LLCs are not subject to the prohibition on contributions stated in section 8, the next question to consider is how such contributions should be reported, i.e.,

¹ Section 8 was last amended in 1986, before the passage of the Limited Liability Company Act.

² The Federal Election Commission has determined that LLCs are not subject to the Federal prohibition on corporate contributions and that such entities may therefore contribute to Federal candidates. See FEC AO1997-4. The FEC observed that the statutes creating LLCs reflect "the corporate characteristic of limitation of liability for all the members of an LLC, along with the lack of other characteristics generally associated with corporations, i.e., free transferability of interest and continuity of life." Therefore, the FEC has concluded that LLCs "are a separate type of business entity with its own comprehensive statutory framework." This office agrees that LLCs are separate and distinct from business corporations and should not be seen as synonymous with such corporations.

³ The office has concluded that professional corporations (PCs), although not expressly named in the statute, are subject to the prohibition. See interpretive bulletin IB-82-01. Unlike the LLC Act, however, the Professional Corporation Law states that PCs are subject to all of the restrictions applicable to business corporations except where inconsistent with that statute. See M.G.L. c. 156A, s. 4(a) and OCPF advisory opinion AO-95-24.

whether the contributions should be considered to be from the LLCs as a separate entity, or from individual members of the LLC.

LLCs, because they share many characteristics of partnerships, are generally treated as partnerships for tax purposes. See 26 CFR 301.7701, which defines the terms "person," "corporation," and "partnership" as those terms are used in the tax code, and states that "the term 'partnership' is broader in scope than the common law meaning of partnership and may include groups not commonly called partnerships."

Similarly, in the context of the campaign finance law, contributions from LLCs should be treated in the same manner as contributions from partnerships, i.e., contributions from LLCs will be considered to be made individually by the members of an LLC rather than from the LLC as a separate entity. Each LLC contribution must be attributed to the member or members of the LLC whose member's equity account is affected as a result of the making of the contribution and who is the true source of the contribution.

Contributions may be accepted only if attributable to specific LLC members. See 970 CMR 1.04(3). A contribution may not be accepted by a candidate, PAC, or political party committee if the contribution affects the equity account of a member which is a business or professional corporation. See AO-95-05, which specifies that a committee receiving a contribution from a partnership must obtain information from the partnership which reflects the name and address of each partner and the amount of the contribution which is attributable to each partner. If the equity account of a corporation would be affected by the making of a contribution or if a corporation would be the true source of funds used to make a contribution, the contribution could not be made.⁴

3. LLCs may be considered "membership organizations."

In 1994 the campaign finance law was amended to state that "communications from a membership organization, not including a corporation subject to section eight, to its members and their families on any subject shall not be deemed to be a contribution or expenditure." M.G.L. c. 55, s. 1 (emphasis added). The office has issued regulations defining a "membership organization" as an organization "which identifies individuals within the organization as members." See 970 CMR 2.02.

As discussed above, an LLC is not subject to section eight. Therefore, an LLC which is comprised solely of individuals (as distinguished from entities such as trusts, corporations, PCs

⁴ We assume that the contribution has been authorized by the member or members to whom the contribution is attributed.

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and partnerships) as members would be a "membership organization." Any LLC which has entities such as trusts, corporations, PCs or partnerships as members is not a "membership organization."

Costs incurred to distribute communications to members of a membership organization would not be considered "contributions" or "expenditures" subject to the reporting provisions and limitations of the campaign finance law.

I encourage you to contact us in the future if you have further questions about the receipt of contributions from LLCs, or regarding any other aspect of the campaign finance law.

Sincerely,

A handwritten signature in cursive script that reads "Michael J. Sullivan". The signature is written in dark ink and is positioned above the printed name and title.

Michael J. Sullivan
Director